Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SHONG-CHING TONG,

Petitioner

v.

PAUL TURNER, COLEMAN A. SWART,
THE COUNTY OF LOS ANGELES,
THE STATE OF CALIFORNIA,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

1. Should immunity be available to Paul Turner acting alone as a Presiding Justice of Division 5 of the California Court of Appeal Second Appellate District?

2. Should immunity be available to Coleman A. Swart when he had no jurisdiction to vacate the default entered against a lawyer defendant, Rochelle D. Stanton?

3. Should immunity be available to the County of Los Angeles, California when it failed to safely keep records in the case file?

4. Should immunity be available to the State of California when it took petitioner's money and failed to provide services?

5. Whether Petitioner's complaint for damages against Paul Turner, Coleman A. Swart, the County of Los Angeles, and the State of California was seeking appellate review?

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Petitioner prays that a writ of certiorari issue to review the memorandum of the United States Court of Appeals for the Ninth Circuit dated November 22, 1995.

OPINIONS BELOW

The Memorandum of the Court of Appeals in affirming the dismissal of petitioner's 42 U.S.C. Section 1983 action was issued on November 22, 1995 and is printed in Appendix A. On January 5, 1996, The Appellate Court denied petitioner's Petition for Rehearing. The Order is printed in Appendix B. The Report and Recommendation of United States Magistrate Judge is printed in Appendix C and Petitioner's Objection to Magistrate Judge's Report and Recommendation is printed in Appendix D.

JURISDICTION

The Memorandum of the United States Court of Appeals for the Ninth Circuit was filed on November 22, 1995 and the Order denied Petition for Rehearing was filed on January 5, 1996. The jurisdiction of this Court rests on 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, previleges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

California Conatitution, Article VI, Section 3, provides:

"The Legislature shall divide the STATE into districts each containing a court of appeal with one or more

divisions. Each division consisting of a presiding justice and 2 or more associate justices. It has the power of a court of appeal and shall conduct itself as a 3-judge court. Concurrence of 2 judges present at the argument is necessary for a judgment."

28 U.S.C. Section 455(a):

A Federal Judge must disqualify himself or herself from any proceeding in which his or her impartiality might reasonably be questioned.

California Code of Civil Procedure, Section 170.1 (a)(6)(C):

Whenever a judge's impartiality might reasonably be questioned, establishes a fundamentally objective standard for disqualification, and the party seeking disqualification no longer need prove that the judge is actually biased.

STATEMENT OF THE CASE

On May 10, 1993, the Los Angeles Superior Court granted Federal Deposit Insurance Corp.'s ("FDIC") motions to dismiss plaintiff's actions in Shong-Ching Tong v. Assured Thrift and Loan Association, et al., case nos. KC004451 and KC004452, on the ground that State Court lacks subject matter jurisdiction.

On November 24, 1993, respondent Turner unlawfully and willfully issued an order finding the petitioner to be a vexatious litigant. This order was in violation of the California Constitution, Article VI, Section 3 and due process of law.

On December 28, 1993, respondent Turner dismissed petitioner's appeal, case no. KC004452, because of his vexatious litigant allegation.

On June 10, 1994, the California Court of Appeal, Second Appellate District, Division 2, reversed the

dismissal, case no. KC004451 and awarded costs on appeal to petitioner.

On April 22, 1993, petitioner filed a Complaint in the Los Angeles Superior Court, Northeast District, Case No. GC009783, case name SHONG-CHING TONG, YEI-HWEI TONG v. STEPHEN LAW, CHI CHEUNG, ROCHELL D. STANTON, et al., for damages against them for Malicious Prosecution, Abuse of Process, inter alia.

On May 28, 1993, default against Stanton was entered after Stanton failed to timely respond to the complaint.

On or about December 15, 1993, the Research Attorney of the Los Angeles Superior Court, Northeast District, called petitioner informing Petitioner that the hearing of Stanton's demurrer to the complaint would be continued to January 21, 1994 because she could not find the original Complaint and was waiting for Stanton to furnish a copy of the complaint to her.

On January 21, 1994, respondent Swart sustained Stanton's demurrer to the complaint without leave to amend in spite of the facts that Stanton, as an attirney at law, had committed frauds on the court and perjury.

On or about March 21, 1994, petitioner filed a "Notice of Appeal" re Case No. GC009783.

On or about June 15, 1994, respondent Turner, again acting alone, unlawfully issued his Orders:
(1) DIRECTING PLAINTIFFS, SHONG-CHING TONG TO SHOW THE PRESENT LITIGATION HAS MERIT; AND, (2) STAYING ALL PROCEEDINGS.

On or about June 24, 1994, Plaintiffs in Case No. B083416 filed: (1) "Appellants' Request that this court

should ask the California Supreme Court to transfer the appeal to another Division or another District, etc."; (2) "Appellant Yei-Hwei Tong's Response to court's order to show the present litigation has merit"; (3) "Appellant Shong-Ching Tong's Response to court's order to show the present litigation has merit"; (4) " Request to Recuse Justice Paul Turner, etc."; and (5) "Request to Recuse Justicee Paul Turner and Ramona Godoy Perez, etc.".

On or about July 19, 1994, respondent Turner acting alone unlawfully issued Orders: (1) Denying Recusal Motion; (2) Denying Motion to Transfer Appeal; (3) Dismissing Appeal of Shong-Ching Tong; (4) Awarding Costs; and (5) Directing Issuance of Rule 17 (a) Notice.

On December 8, 1994, petitioner filed a complaint in the U. S. District Court for the Central District of California against respondents after petitioner's Civil Rights under the Constitutions of the United States and the State of California were violated by respondents.

On or about January 3. 1995, respondents Paul Turner and the State of California filed a "Notice of Motion to Dismiss Complaint, etc..".

On or about January 29, 1995, respondents Swart and County of Los Angeles filed a "Notice of and Motion of Defendants Judge Coleman A. Swart and County of Los Angeles to Dismiss, etc.."

On or about January 30, 1995, "Plaintiff's opposition to defendants' Motions to Dismiss, etc." was filed.

On February 6, 1995, the "Notice of Filing of Magistrate Judge's Report and Recommendation and the Lodging of Proposed Judgment" recommending dismissal of plaintiff's case, was filed by the Magistrate Judge

Charles T. Eick.

On Febuary 15, 1995 "Plaintiff's Objections to Magistrate Judge's Report and Recommendation and the Proposed Judgment, etc." was filed by petitioner.

On April 10, 1995, Judgment of dismissal of petitioner's case was entered.

On May 8, 1995, Petitioner's "Notice of Appeal" was filed.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Erred in Its Resolution of an Important and Recurring Issue significantly Affecting the Administration of Justice - Whether Petitioner's Complaint Against Respondents Were Seeking Appellate Review

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Title 42 U.S.C. Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In Crooks v. Maynard 913 F.2d 699 (9th Cir. 1990), the court held that:

"Mere fact that defendant is judge does not mean that defendant has absolute immunity; absolute immunity only applies to judicial acts and not administrative, legislative, and executive functions that judges may perform."

In Owen v. City of Independence, Mo., et al. 445 U.S. 621, 100 S.Ct. 2979, the U. S. Supreme Court held that:

"Civil Rights Act, by its terms, creates a species of tort liability that on its face admits of no immunities; its language is absolute and unqualified, and no mention is made of any privileges, immunities, or defenses that may be asserted; rather, it imposes liability upon 'every person,' who, under color of state law or custom, 'subjects, or causes to be subjected', any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." U.S.C.A. Const. Amend. 14.

"The purpose of the Act (is) to provide protection to those persons wronged by the abuse of government authority and to deter future constitutional violations . . . ."

The U. S. Supreme Court further held that:

"Section 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as deterrent against future constitutional deprivations, as well."

"The Act imposes liability upon every person who, under color of State law or custom, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws".

In Monroe v. Pape (1961) 365 U. S. at 184, 81 S.Ct. at 482, the U. S. Supreme Court held that:

"The central aim of the Civil Rights Act was to provide protection to those persons wronged by the misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law (Quoting United States v. Classic, 313 U. S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941)). By creating an express federal remedy, Congress sought to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority, whether they act in accordance with their authority or misuse it."

In "Plaintiff's objection to Magistrate Judge's Report and Recommendation", petitioner presented evidence and arguments on issues of respondents' immunities and stated reasons the immunities should not be granted to them.

As a matter of fact, as alleged in the Complaint, respondents were being sued for damages caused by their repeated, unlawful, unethical, and oppressive conduct and acts, which had violated petitioner's civil rights, under the constitutions of the United States and the State of California.

In D. C. Court of Appeals v. Feldman 460 U.S. 462, 490, Mr. Justice STEVENS, in his dissenting opinion, stated that:

> "If a challenge to a state court's decision is brought in United States district court and alleges violations of the United States Constitution, then by definition it does not seek appellate review. It is plainly within the Federal question jurisdiction of the Federal Court. 28 U.S.C. Section 1331 (1976 ed. Supp. V)".

In Stump v. Sparkman 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099, Mr. Justice STEWART in his dissenting opinion, had stated "A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity.

In Pierson v. Ray 87 S.Ct. 1213, 1220 (1967), Mr. Justice DOUGLAS, in his dissenting opinion, had stated, or quoted, that:

> "Congress intended to provide a remedy for the wrongs being perpetrated."
>
> "The Courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity."

"There had been a complete breakdown in the administration of justice in certain States and laws nondiscriminatory on their face were being applied in a discriminatory manner." at p. 1221

"The section's purpose was to provide redress for the deprivation of civil rights. It was recognized that certain members of the judiciary were instruments of oppression and were partially responsible for the wrongs to be remedied . . . . Some State Courts have been instruments of suppression of civil rights. . . ; but the wrong to be remedied still exists." at p. 1222

"I cannot believe that judges * * * would fail to discharge their duty faithfully and fearlessly according to their oaths and consciences * * *." at p 1223

In Monroe v. Pape 81 S.Ct. 473, 476 (1961), the Supreme Court held that"

"The question with which we now deal is the narrower one of whether Congress, in enacting Section 1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position (Citations omitted). We conclude that it did so intend."

In the instant case as demonstrated by Appendixes, respondents Turner and Swart had acted unconstitutionally, unlawfully, and oppressively. Furthermore, what they did was inconsistent with actual justice and not warranted by any principle of law.

Since the Civil Rights Act authorizes any person, who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal Courts, petitioner's complaint was not seeking appellate review and has stated a Federal Cause of Action in the instant case.

II.

Immunity Should Not Be Available to TURNER Because TURNER Had No Jurisdiction To Deny Plaintiffs' Requests Disqualifying Him From Plaintiffs' Appeal, Case No. B083416

A Federal Judge must disqualify himself or herself from any proceeding in which his or her impartiality might reasonably be questioned. 28 U.S.C. Section 455(a).

In Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 714 (9th Cir. 1990), the Court, quoting Herrington v. Sonoma County, 834 F.2d 1488, 1503 (9th Cir., 1987), held that:

> "The test for recusal in this Circuit is whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned."

California Code of Civil Procedure (CCP), Section 170.1 (a)(6)(C), providing for disqualification whenever a judge's impartiality might reasonably be questioned, establishes a fundamentally objective standard for disqualification, and the party seeking disqualification no longer need prove that the judge is actually biased.

In United Farm Workers of America v. Superior Courts (1985) 170 Cal.App.3d 97, 103-104, 216 CR 4, the California Court held that "disqualification is mandated if a reasonable person would entertain doubts concerning the judge's impartiality."

III.

TURNER Had No Jurisdiction To Deny Plaintiffs' Requests For Transfer In CASE NO. B083416

California Rules of Court, Rule 26 (a) provides that cases pending in the Appellate Court can be transferred to another Division or District by the California Supreme Court.

In National Kinney v. Workers' Comp. Appeals Bd. (1980) 113 CA3d 203. 169 CR 801, the California Court held that parties in an Appeal can ask the Appellate Court to request the California Supreme Court to transfer an appeal case.

As Exhibits contained in "Appellants' Request that this court should ask the California Supreme Court to transfer the Appeal to another Division or another District" depict, respondent Turner had no jurisdiction to deny plaintiffs' Request for transfer after Turner had been requested to disqualify himself from the case no. B083416.

Again, pursuant to Califorina Constitution, Article VI, Section 3, respondent Turner, acting alone, could not and should not think he was/is the California Court of Appeal.

IV.

TURNER Had Violated Petitioner's Civil Rights Under Constitutions Of The United States And The State Of California

California Constitution, Article VI, Section 3, provides that the court of appeal SHALL conduct itself as a 3-judge court and any determination of the merits that is to bind the parties must have the agreement of two justices (In re Christopher A. (1991) CA3d 1154, 277 CR 302.)

DUE PROCESS requires that the party against whom judgment is to be entered have adequate notice and opportunity to be heard.

The fact that petitioner was not given any opportunity to argue the Vexatious Litigant issue prior to respondent Turner's order that he had determined that petitioner was a Vexatious Litigant and that the lack of any findings of fact and conclusion of law demonstrate that respondent Turner violated the petitioner's Civil Rights under the Constitutions of the United States and the State of California, by denying petitioner's right to due process of law.

V.

TURNER Had Violated California Constitution, Article VI, Section 3

California Constitution, Article VI, Section 3, provides:

> "The Legislature shall divide the STATE into districts each containing a court of appeal with one or more divisions. Each division consisting of a presiding justice and 2 or more associate justices. It has the power of a court of appeal and shall conduct itself as a 3-judge court. Concurrence of 2 judges present at the argument is necessary for a judgment."

In case no. B077109, the Orders of November 24, 1993

and July 15, 1994, case no. B083416 were not made by a panel of the court of appeal, but rather by respondent Turner, acting alone. The orders, thus, were in violation of California Constitution, Article VI, section 3.

VI.

Immunity should not be available to Swart and Turner Because Their Acts and Conduct Were Beyond The Pale Of Anything That Could Sensibly Be Called Judicial Acts

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In Kappel v. Fecher, et al. (1988) 200 CA3d 1464, 246 CR 815, the California Supreme Court held that:

"Allegation that false declaration . . . was executed with knowledge that it was false satisfied ulterior motive element in abuse of process of action."

"Knoving execution of false declaration . . would satisfy abuse of process element requiring commission of willfull act in wrongful manner."

"When he (defendant) knowingly executed false declaration . . . was sufficient to establish cause of action based on respondent superior theory for abuse of process."

"Allegations . . . alleged execution of false declaration . . . were sufficient to withstand demmurrer to causes of action negligent and negligent infliction of emotional distress."

As Prosser & Keaton on Torts (5th Ed. 1984), Chapter 21, Section 121, pp. 897-899, explains that abuse of process may apply to misuse of the judicial system.

In Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94, 101 CR 745, the California court states that:

" 'Process' as used in the tort of 'abuse of process', has been interpreted broadly to encompass the entire range of 'procedures' incident to

litigation . . . . This broad reach of the 'abuse of process' tort can be explained historically, since the tort evolved as a 'Catch-All' category to cover improper uses of judical machinery."

In Coleman v. Gulf Ins. Group (1986) 41 Cal.3d 782, 226 CR 90, the California court held that:

"To establish a cause of action for abuse of process, a plaintiff must plead two essential elements: that the defendant (1) entertained an ulterior motive in using the process and (2) committed a willfull act in a wrongful manner."

Also, in Kappel v. Fecher, Supra, the court noted that:

"there are some cases which have held that 'ulterior motive' is establised by evidence of some collateral, illegal objective (Golden v. Dungan (1971) 20 Cal.App.3d 295, 97 CR 577) . . . but the better view is that it is not necessary to plead actual malice of collateral, illegal objective, but that malice may be 'inferred from the willfull abuse of the process' (Tranchina v. Arcinas (1947) 78 Cal.App.2d 522, 178 P.2d 65). Once the wrongful act has been established, courts often infer the requisite ulterior motive."

Again, the court in Kappel, Supra, further held that:

"A knowing execution of a false declaration . . ., a party injured thereby could state a cause of action for negligence or negligent infliction of emotional distress . . . . Plaintiff has stated two such causes of action in the case at bench. The pleading is sufficent to withstand demurrer."

As facts stated in the complaint and documents filed in Case No. GC009783, respondent Swart had unlawfully, maliciously and oppressively sustained Rochelle D. Stanton's Demurrer to Complaint without leave to amend.

As Exhibits contained in the case file demonstrate, respondent Turner's acts and conduct were beyond the pale of anything that could sensibly be called a judicial act.

Since respondents Turner and Swart had abused the judicial machinery in Case Nos. GC009783 and B083416, respondents had forfeited their immunities and should be held for petitioner's damages resulted from thier abuses of judicial process.

VII.

THE STATE OF CALIFORNIA, AS A PUBLIC ENTERPRISE, IS LIABLE FOR TURNER'S UNLAWFUL AND WRONGFUL ACTS AND CONDUCT

The United States Constitution, Fifth Amendment provides that respondents the State of California and Turner shall not deprive of petitioner's life, liberty, or property without due process of law, nor shall take petitioner's property for public use without just compensation.

The United States Constitution, Fourteenth Amendment, Sec. One provides that respondents the State of California and Turner shall not deprive petitioner's life, liberty, or property, without due process of law; or deny petitioner within its jurisdiction the equal protection of laws.

In the instant case, the State of California ignored and refused to take corrective action after petitioner had presented facts and evidence re respondent Turner's wrongful and unlawful acts and conduct in case nos. B077109 and B083416.

Since respondent Turner had acted like a loose cannon, had acted unprofessionally and unethically, and the State of California had taken petitioner's money on appeal in case no. B083416 and failed to provide service as the fees paid for, the State of California, as a public enterprise, is liable for damages caused by respondent Turner.

VIII.

The County Of Los Angele, As A Public Enterprise, Is Liable For Its Employees' Failure To Safely Maintain Records Contained In The Court File

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When petitioner filed the complaint in case no. GC009783, petitioner paid fees as required by law to the County of Los Angeles, who has the duty and responsibility to store and file all documents in safe keeping.

From April 22, 1993 to present, even after petitioner had repeatedly asked the County of Los Angeles to properly and safely keep the court file in May, 1994, many records had continually disappeared from the court file. Because some records were not existed in case file, Stephen Law aka Zhanjun Luo aka Zhan J. Luo aka Stephen Luo, who had been declared as a Vexatious Litigant and had filed a Chapter 7 Bankruptcy Petition to frustrate state court's judgments and who was a defendant and Cross-Complainant in case no. GC 009783, had repeatedly filed Peremptory Challenge to remove Judge Charles Lee and Judge Thomas Stoever in case no. GC009783.

Again, because records were missing, default has never been entered against Chi Cheung, who was a defendant in case no. GC009783 and was invented by Stephen Law. Since the County of Los Angeles had failed to enforce the laws and has failed to keep all records in the case file, case no. GC009783, the County of Los Angeles, as a public enterprise, is liable for its employees' wrongful and unlawful acts and conduct as alleged in the complaint.

CONCLUSION

Mr. Justice BRENNAN of the United States Supreme Court had stated in Adickes v. Kress & Co., 398 U. S. 144, 190, 90 S.Ct. 1598, 1620, 26 L.Ed.2d 142 (1970):

> "How 'Uniquely amiss' it would be, therefore, if the government itself - ' the social organ to which all in our society look for promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' - were permitted to disavow liability for the injury it has begotten."

This case is not to seek reviews of state courts' rulings. Rather, this case is suing for damages for their willful and unlawful violations of plaintiff's Civil Rights.

Based upon all of the foregoing points and authorities, respondents' acts and conduct violated clearly established State and Federal Statutory and the Constitutional Rights of which a reasonable person would have known.

Petitioner respectfully requests that a Writ of Certiorari should be issed to review the judgment in the instant case.

Dated: April 3, 1996

Shong-Ching Tong,
Petitioner Pro Se

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHONG-CHING TONG, Plaintiff-Appellant, v.	No. 95-55692 D.C. No. CV-94-08262-SVW Central California (Los Angeles)
PAUL TURNER, Individually; CLOEMAN A. SWART, Individually; LOS ANGELES COUNTY; STATE OF CALIFORNIA, Defendants-Appellees.	COURT OF APPEAL FILED January 5, 1996 Cathy A. Catterson, Clerk ORDER

Before: PREGERSON, NORRIS, and REINHARDT,
Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

NOT TO BE PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHONG-CHING TONG,
Plaintiff-Appellant,
v.
PAUL TURNER, Individually; COLEMAN A.SWART, Individually; LOS ANGELES COUNTY; STATE OF CALIFORNIA,
Defendants-Appellees.

No. 95-55692
D.C. No. CV-94-08262-SVW
COURT OF APPEAL
FILED
November 22, 1995
Cathy A. Catterson, Clerk

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California

Stephen V. Wilson, District Judge, Presiding
Submitted November 20, 1995**

Before: PREGERSON, NORRIS, and REINHHARDT,
Circuit Judges.

Shong-Ching Tong appeals pro se the district court's dismissal of his 42 U.S.C. Section 1983 action alleging his civil rights were violated by state judges during proceedings in Tong's tort litigation in state court. We have jurisdiction,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

and we affirm for the reasons stated in the Magistrate Judge's Report and Recommendation which was adopted in full by the district court.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHONG-CHING TONG, Plaintiff, v. PAUL TURNER, Individually, COLEMAN A. SWART, Individually, The County of Los Angeles, The State of California, Defendants.	No. CV 94-8262-SVW(E) U.S. DISTRICT COURT Central District of California FILED February 3, 1995 REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Stephen V. Wilson, United States District Judge, pursuant to 28 U.S.C. Section 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

Plaintiff filed a "Complaint for Damages" on December 8, 1994. Defendants Coleman A. Swart ("Swart") and the County of Los Angeles filed a motion to dismiss on December 29, 1994. Defendants Paul Turner ("Turner") and the State of California filed a motion to dismiss on January 3, 1995. Plaintiff filed oppositions to Defendants' motions to dismiss on January 31, 1995. The Court has taken the motions to dismiss under submission without oral argument.

BACKGROUND

Plaintiff seeks damages against Swart (a Los Angeles

Superior Court Judge), Turner (a Justice of the California Court of Appeal), the State of California and the County of Los Angeles. Plaintiff alleges monetary and emotional injuries resulting from certain state court litigation. Plaintiff alleges the individual defendants made erroneous rulings and improper orders during this litigation. Plaintiff also alleges the Superior Court misplaces filed documents.

DISCUSSION

For the reason discussed below, this action should be dismissed with prejudice.

I. Judicial Immunity Bars Plaintiff's Claims Against the Individual Defendants.

Judges are absolutely immune from claims for monetary damages for acts performed in their judicial capacities. See Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 288 (1991); Dennis v. Sparks, 449 U.S. 24, 27 (1980); Atkinson-Baker & Associates v. Kolts, 7 F. 3d 1454 (9th Cir. 1993); Ashelman v. Pope, 793 F. 2d 1072, 1075 (9th Cir. 1986). Judicial immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." Ashelman v. Pope, supra, 793 F. 2d at 1075 (quoting Cleavinger v. Saxner, 474 U.S. 193, 199-200 (1985)).

A judge is subject to liability only when: (1) the challenged action was "not taken in the judge's judicial capacity;" or (2) the challenged action was taken " in the complete absence of all jurisdiction." Mireles v. Waco, supra, 112 S. Ct. at 288. An action is within a judge's "judicial capacity" if the action involves " a function normally performed by a judge." Id. A fraudulent or corrupt motive underlying performance of a judicial function does

not destroy judicial immunity. Forrester v. White, 484 U.S. 219, 227 (1988) ("[a judicial act] does not become less judicial by virtue of an allegation of malice or corruption of motive"); Ashelman v. Pope, supra, 793 F. 2d at 1078 (conspiracy between judge and lawyer " to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges ..."). The individual Defendants' challenged rulings and orders clearly involved "functions normally performed by a judge." Ibid.

Similarly, these challenged rulings and orders did not occur " in the complete absence of all jurisdiction." The doctrine of judicial immunity distinguished between actions taken "in excess of jurisdiction" and actions taken "in the complete absence of all jurisdiction." Judicial immunity protects actions taken "in excess of jurisdiction." See, e.g., Stump v. Sparkman, 435 U.S. 349, 356 (1978)("A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority ..."). ""Excess of jurisdiction,' as distinguished from the entire absence of jurisdiction, means that the act, although within the power of the judge, is not authorized and therefore void with respect to the particular case because the conditions which alone authorize the exercise of his general power in that particular case are wanting, and hence the judicial power is not lawfully invoked").

At most, Plaintiff's allegations in the present case suggest judicial actions taken in excess of jurisdiction. Plaintiff's allegations do not suggest actions taken in the "clear absence of all jurisdiction over the subject-matter." Stump v. Sparkman, 435 U.S. 349, 356 n.6 (1978)(citations and quotations omitted). Therefore, the individual Defendants are absolutely immune from suit. Ibid.

II. The Eleventh Amendment Bars Suit Against the State of California.

"[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1984); Accord Southern Pacific Transportation Co. v. Los Angeles, 922 F.2d 498, 508 (9th Cir. 1990), cert. denied, 502 U.S. 943 (1991).

III. The Complaint Fails to State a Claim Against the County of Los Angeles.

Plaintiff attempts to hold the County of Los Angeles liable for the Superior Court's alleged misplacement of filed documents. The Superior Court is a state agency, not a county agency. See Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103, 1110 (9th Cir. 1987). The Eleventh Amendment would bar suit against the Superior Court. Id.

Moreover, negligent misplacement of documents would not state a claim for violation of Plaintiff's civil rights. See Davidson v. Cannon, 474 U.S. 344, 347-48 (1986)(mere negligence does not justify liability in a civil rights action); see also Meehan v. County of Los Angeles, 856 F.2d 102, 106-107 (9th Cir. 1988)("the local government cannot be held liable under section 1983 on the theory of respondeat superior").*

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* This Court does not intend to foreclose Plaintiff from bringing suit in state court. To the extent any of Plaintiff's allegations present pendent state claims, the Court declines to exercise supplemental jurisdiction, See 28 U.S.C. Section 1367; see also United Mine Workers v. Gibbs, 383 U.S. 715, 725-27 (1966).

CONCLUSION

A complaint filed pro se may be dismissed without leave to amend where "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 623 (9th Cir. 1988) (citations and quotations omitted); see Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (dismissal with prejudice is appropriate where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief"). The fundamental nature of the deficiencies in Plaintiff's complaint make it "absolutely clear" that these deficiencies "could not be cured by amendment." Karim-Panahi v. Los Angeles Police Department, supra. Therefore, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered dismissing this action without prejudice.

DATED: February 3, 1995

/S/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHONG-CHING TONG,
Plaintiff,

v.

PAUL TURNER, Individually, COLEMAN A. SWART, Individually, The County of Los Angeles, The State of California,
Defendants.

No. CV 94-8262-SVW(E)

U.S. DISTRICT COURT
Central District of California
FILED
February 15, 1995

PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND THE PROPOSED JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF SHONG-CHING TONG IN SUPPORT OF PLAINTIFF'S OBJECTIONS

COMES NOW, the Plaintiff Shong-Ching Tong ("Plaintiff") and submits the following Memorandum of Points and Authorities and Declaration of Shong-Ching Tong in support of plaintiff's objections to Magistrate Judge's Report and Recommendation and the Proposed Judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On December 9, 1994, plaintiff filed a Complaint for damages against Defendants Paul Turner ("Defendant Turner"), Coleman A. Swart ("Defendant Swart"). The County of Los Angeles ("The County") and The State of California ("The State").

Defendants Swart and Turner are being sued individually for their violations of plaintiff's Civil Rights under the Constitutions of the United States and the State of California. Abuse of Process. Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress.

Defendant County is being sued for its failures to keep and maintain the court papers in safe place and defendant State is being sued for its willful, oppressive, wanton, and fraudulent acceptance of plaintiff's fees and then refused to provide service.

On or about February 10, 1995, plaintiff received the "Notice of filing of Magistrate Judge's Report and Recommendation and lodging of Proposed Findings and facts and conclusion of law and Proposed Judgment."

Plaintiff hereby submits his objections to Magistrate Judge's Report and Recommendation and the Proposed Judgment.

II.

DEFENDANTS TURNER AND SWART HAD FORFEITED THEIR IMMUNITIES BECAUSE THEY HAD ACTED WITHOUT JURISDICTION

In plaintiff's Oppositions to defendants' motions to dismiss, plaintiff had presented ample evidence in support of plaintiff's allegations that defendants Turner and Swart had acted without jurisdiction in cases as stated in the Opposition.

Since defendants Turner and Swart had abused their power in cases as stated wantonly, oppressively, and maliciously, and maliciously, they had forfeited their immunities.

III.

THE STATE OF CALIFORNIA AND THE COUNTY OF LOS ANGELES SHOULD BE HELD LIABLE FOR DEFENDANTS', TURNER AND SWART, WRONGFUL AND UNLAWFUL ACTS

Exhibits attached to oppositions to defendants' motions to dismiss have shown defendants Turner and Swart had acted repeatedly, wantonly, oppressively, maliciously, unlawfully in cases as stated in the opposition when defendants Turner and Swart acted without jurisdiction.

Since the State of California and the County of Los Angeles accepted plaintiff's fees and failed to provide services paid for, the State and the County had acted fraudulently, wantonly, oppressively, and unlawfully in cases as stated. Thus, the County should be held liable for damages caused by defendants Turner and Swart in case as stated.

IV.

CONCLUSION

The Magistrate Judge's Report and Recommendation should be denied because defendants had violated plaintiff's Civil Rights under the Constitutions of the United States and the State of California.

Further, Defendants had forfeited their immunities when they failed to comply with elementary principles of procedural due process and their acts and conduct were malicious, wanton, oppressive, intentional, and unlawful. Ample Exhibits have proved defendants' malicious, wanton, oppressive, and unlawful conduct and acts.

DATE: February 13, 1995

/S/
Shong-Ching Tong,
Plaintiff Pro se

DECLARATION OF SHONG-CHING TONG

I, SHONG-CHING TONG, declare:

1. Declarant is the plaintiff in the instant case and is familiar with the facts in this case and, if called upon to testify, could and would testify competently and from personal knowledge as to matters stated within this declaration.

2. In order for the court to review allegations contained in the complaint are true, declarant requests the court take judicial notice on all Exhibits attached to plaintiff's Oppositions filed previously.

I declare under penalty of perjury of laws of California that the foregoing is true and correct, and that this declaration is executed on this 13th day of February, 1995 at Pomona, California.

/S/
Shong-Ching Tong

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHONG-CHING TONG,
Plaintiff-Appellant,

v.

PAUL TURNER;
RAMONA GODOY PEREZ;
ZAIDA HERALDZ,
Defendants-Appellees.

No. 95-55176
D.C. No. CV-94-08263-HLH(J)
Central California
(Los Angeles)

COURT OF APPEAL
FILED
January 2, 1996
Cathy A. Catterson, Clerk

ORDER

Before: BROWNING, GOODWIN, and O'SCANNLAIN,
Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

NOT TO BE PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHONG-CHING TONG,
Plaintiff-Appellant,
v.

PAUL TURNER;
RAMONA GODOY PEREZ;
ZAIDA HERALDZ,
Defendants-Appellees.

No. 95-55176
D.C. No. CV-94-08263-HLH(J)

COURT OF APPEAL
FILED

November 22, 1995
Cathy A. Catterson, Clerk

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California

Harry L. Hupp, District Judge, Presiding
Submitted September 18, 1995**

Before: BROWNING, GOODWIN, and O'SCANNLAIN,
Circuit Judges.

Shong-Ching Tong appeals pro se the district court's dismissal of his civil rights action seeking damages and injunctive relief against two justices and a deputy clerk of the California Court of Appeal. We have jurisdiction pursuant to 28 U.S.C. Section 1291, and we affirm because the district

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

court lacked subject matter jurisdiction over Tong's action.

Federal district courts lack subject matter jurisdiction to review the final determinations of a state court in judicial proceedings. Branson v. Nott, No. 94-55332, slip op. 9353, 9361 (9th Cir. Aug. 1, 1995). "This is true even when the challenge to a state court decision involves federal constitutional issues." Id.

In his complaint, Tong challenges prior decisions of the California Court of Appeal denying his mandamus petition, declaring him to be a vexatious litigant, and dismissing his appeal. The district court lacked subject matter jurisdiction to review Tong's impermissible collateral attack on prior California state court's dismissal of Tong's action.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHONG-CHING TONG,
Plaintiff,

v.

PAUL TURNER, et al.,
Defendants.

CV. NO. 94-8263-HLH(JR)

U.S. DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA
FILED
December 12, 1994

REPORT AND
RECOMMENDATION ON
A CIVIL RIGHTS
COMPLAINT

This Report and Recommendation is submitted to the Honorable Harry L. Hupp, United States District Judge, pursuant to the provisions of 28 U.S.C. Section 636(b)(1)(b) and General Order 194 for the Central District of California.

Plaintiff has filed a "civil rights" action against 2 Justices of the California Court of Appeal and a Deputy Clerk of that court. Plaintiff contends that certain rulings by the Justices have violated his civil rights. The Deputy Clerk signed a "Remittitur Notice" from the court.

1. The Justices are absolutely immune. Stump v. Sparkman, 435 U.S. 349, 356 (1978).

2. The Clerk is entitled to quasi-judicial immunity in issuing orders from the court even if an error is made in the order. Morrison v. Jones, 607 F.2d 1269 (9th Cir. 1979) cert. denied, 445 U.S. 962 (1980).

If a party appearing before the Court of Appeal is unhappy with a decision he may appeal to the California Supreme Court and also not vote for the re-election of the Justices.

This complaint is not capable of being amended to state a federal cause of action against any of the 3 named defendants.

IT IS THEREFORE RECOMMENDED that the case be dismissed.

DATED: December 12, 1994.

/S/
JOSEPH REICHMANN
United States Magistrate Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHONG-CHING TONG,
Plaintiff,

v.

PAUL TURNER, et al.,
Defendants.

CV. NO. 94-8263-HLH(JR)

U.S. DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA
FILED
December 12, 1994

JUDGMENT
PROPOSED

The case is DISMISSED as it fails to state a federal cause of action against any of the named defendants.

DATED:

/S/
HARRY L. HUPP
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHONG-CHING TONG,
Plaintiff,

v.

PAUL TURNER, Individually, RAMONA GODOY PEREZ, Individually, ZAIDA HERALDEZ, Individually,
Defendants.

CASE NO. CV 94-8263-HLH(JR)

U.S. DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA
FILED
December 27, 1994

PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND THE PROPOSED JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF SHONG-CHING TONG IN SUPPORT OF PLAINTIFF'S OBJECTIONS

COMES NOW, the Plaintiff Shong-Ching Tong ("Plaintiff") and submits the following Memorandum of Points and Authorities and Declaration of Shong-Ching Tong in support of plaintiff's objections to Magistrate Judge's Report and Recommendation and the Proposed Judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

On December 9, 1994, plaintiff filed a Complaint for damages against Defendants Paul Turner ("Defendant Turner"), Romona Godoy Perez ("Defendant Perez") and Zaida Heraldez ("Defendant Heraldez") individually for their violation of plaintiff's Civil Rights under the Constitutions of the United States and the State of California, Abuse of Process, Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress.

On or about December 12, 1994, Plaintiff's complaint was served on defendants.

On or about December 14, 1994, the "Notice of filing of Magistrate Judge's Report and Recommendation and the lodging of Proposed Judgment was received by plaintiff.

Plaintiff hereby submits his objections to Magistrate Judge's Report and Recommendation and the Proposed Judgment.

II.

DEFENDANTS TURNER AND PEREZ HAD FORFEITED THEIR IMMUNITIES BECAUSE OF THEIR FAILURES TO COMPLY WITH THE ELEMENTARY PRINCIPLES OF PROCEDURAL DUE PROCESS

Per the Fifth and 14th Amendments to the United States Constitution, A person may not be deprived of life,

liberty, or property without due process of law or denied equal protection of the laws.

In People v. Rams (1984) 37 Cal.3d 136, 207 CR 800, 639 P2d 430, the California court held that:

> "Under Cal. Const. Art. I, Section 7 and 15, ..., a person may not deprived of life, liberty, or property without due process of law."

The application of the Due Process clauses of the United States and California Constitutions must be determined in the context of the individual's Due Process liberty interest in freedom from arbitrary adjudicative procedures (In re Thomas (1984) 161 Cal.App.3d 721, 206 CR 719).

"Due Process of Law requires that a party shall be properly brought into court, and that he shall have an opportunity, when there, to prove any fact which, according to the condition and the usages of common law, would be a 'Protection' to him or his property." (Emphasis Added) Goldie v. Goldie, 79 N.Y.S. 268, 269; Larson v. Dicky, 58 N.W. 167, 171; Kalloch v. Superior Court of City and County of San Francisco 56 Cal. 229, 239.

As Exhibits 8, 9, and 10 depict, Defendant Turner's Orders of November 24, 1993, in case no. B077109, were in violation of Due Process of Law, because defendant Turner did not give plaintiff any opportunity to prove any fact when defendant Turner declared plaintiff as a Vexatious Litigant, yet failed to specify on what basis he made his determination and under what authority he could act alone while plaintiff was petitioning for a writ of mandate.

California Constitution. Article VI. Section 3, provides:

> "The Legislature shall divide the STATE into districts each containing a court of appeal with one or more divisions. Each division consisting of a presiding justice and 2 or more associate justices. It has the power of a court of appeal and shall conduct itself as a 3-judge court. Concurrence of 2 judges present at the argument is necessary for a judgment."

In case no. B077109, the Orders of November 24, 1993 were not made by a panel of the court of appeal, but rather by the presiding justice of Division 5, Paul Turner, defendant herein, acting alone (Exhibit 10). The orders issued by defendant Turner were in violation of California Constitution, Article I, Section 7 and Article VI, Section 3 and, thus, were invalid.

Definition of an APPEAL as stated in the Black's Law Dictionary, 6th Ed. is as follows:

> "An appeal is to report to a superior court (or appellate court) to review the decision of an inferior court."

In Nicastro v. U. S., 206 F.2d 89 and Words & Phrases, permanent Ed., Vol. 3A, pp. 119-121, an appeal is defined as A Continuation of Original Processing and is not a new action.

Since there is no authority, constitutional or otherwise, defining an appeal as a new litigation and the California Legislature has no such intent to do so, thus, the ORDERS issued by defendant Turner on November 24, 1993, acting

alone, were invalid (Moles v. Regents of University of California (1982) 32 Cal.3d 867, 187 CR 557.)

Moreover, a review of the orders determining appellant was/is a **Vexatious Litigant** were vague and ambiguous, because the orders failed to address the basis on which the appellant was being found to be a Vexatious Litigant.

In Petition of General Motors Corp. (1962) 182 N.E.2d 815, the definition of "Meritorious" case is one that is worthy of presentation to court, not one which is sure of success. M. G. L. A. c. 214 Section 28.

The Court in the above case further stated that "any genuine questions of law were involved in the proceedings below giving rise to a meritorious cause for appeal."

The Slip Opinion (Exhibit 12) issued by defendants Turner and Perez was clearly in violation of California Constitution, Article I, Section 7 and Article VI, Section 3, because the Slip Opinion was based on plaintiff's Declaration in response to defendant Turner's unlawful orders, not on records on appeal.

III.

DEFENDANTS TURNER AND PEREZ HAD FORFEITED THEIR IMMUNITIES BECAUSE THEY HAD ACTED WITHOUT JURISDICTION

The normal attributes of a judicial proceeding are to include a "Case", with litigants and the opportunity to appeal, in which there is "Principled decision making."

As stated earlier, the California Constitution had never granted defendant Turner any power to act alone in a Multi-

Division district such as the California Court of Appeal, Second Appellate District.

In the case no. B077109, the normal attributes were missing:

1) there was no case, because defendant Turner did not allow plaintiff to submit the Appellant's Opening Brief and the Appendix. The documents in the case file were his unlawful orders. Plaintiff's Declaration in response to his unlawful Orders, and defendants Turner and Perez' Slip Opinion (Exhibits 10-13).

2) There was no opportunity to appeal. As Exhibits 8-10 depict, defendant Turner's orders were unlawful and unconstitutional and plaintiff cannot appeal his invalid orders.

Since defendants Turner and Perez had abused their power in case no. B077109 wantonly, oppressively, and maliciously, they had forfeited their immunities.

IV.

THE IMMUNITIES SHOULD NOT APPLY TO DEFENDANTS BECAUSE THEIR ACTS AND CONDUCT WERE BEYOND THE PALE OF ANYTHING THAT COULD SENSIBLY BE CALLED A JUDICIAL ACT

As stated earlier, the California Constitution, Article VI, Section 3, mandates each division shall conduct itself as a 3-judge court . . . concurrence of 2 judges presented at the argument is necessary for a judgment.

In case no. B077109, there was no Appeal Brief allowed, there was no argument, and there was no litigant. The Slip Opinion issued by defendants Turner and Perez not only shown their evil motive, wrongful intention, and abuse of their judicial power, the Slip Opinion also shown defendants had acted unethically and unprofessionally as follows:

(1) On page 1, defendants stated "Zoran J. Segina, for defendants and respondents" when defendants knew Zoran J. Segina is an employee of FDIC and can only represent FDIC.

(2) On page 2, paragraph 1, defendants stated "We have judicially noticed the contents of the record in Tong v. Isuzu Motors of America, Inc. (Nov. 23, 1993) B080053" when defendants knew the case no. B080053 was a Petition (Exhibits 9, 10), not an appeal, not the law of the case, and was wantonly, oppressively, and maliciously determined by defendant Turner and Heraldez in a period less than 30 minutes.

(On November 23, 1993, at about 3:30 p.m., the Petition in case no. B080053 was filed. At about 5:50 p.m., plaintiff called defendant Heraldez and answered her questions re the case no. B080053 after defendant Heraldez left a message while plaintiff was on his way back home. On November 24, 1993, at about 8:15 a.m., defendant Heraldez called plaintiff and left a message that the Petition in case no. B080053 was denied)

(3) On page 2, paragraph 3, defendants stated "We have carefully reviewed the brief and conclusionary explanation" when defendants knew there was no BRIEF filed and should not misstate, misrepresent, and distort facts in their Slip Opinion.

(4) On page 2, paragraph 2 can also show defendants had acted maliciously, wantonly, oppressively, and unlawfully when defendants stated "Defendant filed the notice of appeal . . . and directing plaintiff to explain why the present appeal has merit."

(5) On page 2, paragraph 4, lines 16-18, defendants intentionally misstated, misrepresented, and distorted plaintiff's statement by saying "In fact, in paragraph seven of his declaration, plaintiff admits the present case should be in federal court rather than before this court" when the true statements in the Declaration is In fact, the trial court should order FDIC to remove the instant case to the Federal Court."

(6) On page 2, paragraph 4, line 19-22, defendants falsely and maliciously stated "Further, the only intelligent conclusion that can be drawn from the papers before us, including the record in Tong v. Isuzu Motors of America, Inc., supra, is the present appeal has been filed 'for the purposes of harassment'" when (A) defendants failed to present evidence and fact to support their malicious, frivolous, oppressive, wanton, and unlawful conclusions and (B) defendants knew the case no. B080053 was a petition, FDIC was not a party to case no. B080053, the issue of case no. B077109 was whether the State court have jurisdiction over FDIC, and defendants were drafting their published opinion in case no. B070925 (Exhibit 17), in which defendants held the State court have jurisdiction over FDIC (Exhibit 16).

In Stump v. Sparkman, Justice Stewart in his dissenting opinion, had stated "A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity."

Reviews of Exhibits 6, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, and 20, it is clearly shown defendants in case no. B77109 acted like a loose cannon, totally ignored the Constitutions of the United States and the State of California, intentionally abused their judicial power when California Statutes did not say An appeal is a new litigation, did not give authority to them to unlawfully and unconstitutionally dismiss plaintiff's appeal in case no. B077109.

V.

DEFENDANT HERALDEZ IS NOT IMMUNED FOR HER ACT AND CONDUCT IN CASE NO. B077109 WHEN SHE HAD INTENTIONALLY AND REPEATEDLY WRITTEN "DEFENDANTS/RESPONDENTS" WHEN SHE KNEW THERE WAS ONLY ONE DEFENDANT/RESPONDENT

Reviews of court papers written by defendant Heraldez in case no. B077109 indicates that there's no reason for defendants to repeatedly misstate, misrepresent, and distort parties, facts, and evidence (See Exhibits 2, 3, 4, 5, 6, 7, 11, 13).

As a matter of fact, defendants Turner and Perez would not and could not write those court papers in case no. B077109. They might have blindly put their signatures on those court papers when they were told by defendant Heraldez to sign.

As results of defendant Heraldez' repeatedly misstated, misrepresented, and distorted facts and evidence in case no. B077109, such as Respondents shall each separately recover their costs on appeal, Marvin G. Fishler filed a "Memorandum of Costs" after he received the "remittitur" from defendant Heraldez (Exhibits 16, 18).

VI.

CONCLUSION

Defendant had forfeited their immunities when they failed to comply with elementary principles of procedural due process and their acts and conduct were malicious, wanton, oppressive, intentional, and unlawful. Exhibit 16 proved their malicious, wanton, oppressive, and unlawful conduct and act.

Defendants should not be immuned for their loose cannon act and conduct even after they were reminded by plaintiff that they had made mistakes and ignored and refused to correct their errors in case no. B077109 when they unlawfully and oppressively dismissed plaintiff's appeal in case no. B077109.

DATE: December 27, 1994

/S/
Shong-ChingTong
Plaintiff Pro se

DECLARATION OF SHONG-CHING TONG

I, SHONG-CHING TONG, declare:

(1) Declarant is the plaintiff in the instant case and is familiar with the facts in this case and, if called upon to testify, could and would testify competently and from personal knowledge as to matters stated within this declaration.

(2) In order to prove to the court allegations in the complaint are true, declarant attached the following Exhibits as the evidence in the instant case:

1. Order of Dismissal, Los Angeles Superior Court, Case No. KC004451, Case Name SHONG-CHING TONG v. ASSURED THRIFT & LOAN ASSOCIATION, et al., 5/10/93

2. Order of Dismissal, Los Angeles Superior Court, Case No. KC004452, Case Name SHONG-CHING TONG v. ASSURED THRIFT & LOAN ASSOCIATION, et al., 5/10/93

3. Application for Permission to Extend Time for filing the Appellant's Opening Brief, Declaration of Shong-ChingTong in support thereof, California Court of Appeal, Second Appellate District, Case No. B077109 Case Name SHONG-CHING TONG v. ASSURED THRIFT & LOAN ASSOCIATION, 9/8/93

4. Application for Permission to Extend Time for filing the Appellant's Opening Brief, Declaration of Shong-ChingTong in support thereof, California Court of Appeal, Second Appellate District, Case No. B077109 Case Name

SHONG-CHING TONG v. ASSURED THRIFT & LOAN ASSOCIATION, 10/11/93

5. Motion to Affirm Order of Dismissal, filed by FDIC, Case No. B077109, case Name SHONG-CHING TONG v. ASSURED THRIFT & LOAN ASSOCIATION, 10/13/93

6. Appellant's Opposition to Respondent Assured's Motion to affirm order of dismissal; Memorandum of Points and Authorities; Requests for Monetary Sanctions against Zoran J. Segina, 10/24/93

7. Order denying motion to affirm, 11/15/93

8. Cover Page of "Petition for writ of Mandate/Prohibition or Other Appropriate Relief", Case No. B080053, Case Name SHONG-CHING TONG v. ISUZU MOTORS AMERICA, INC., 11/23/93

9. Order denying Petition for Writ of Mandate Prohibition, Case No. B080053, 11/24/93

10. Order directing plaintiff to show the present litigation has merit and stay of all proceedings, Case No. B077109, 11/24/93

11. Declaration of Shong-Ching Tong in response to court's order to show the present litigation has merit and appellant's request that the court stay the order of November 24, 1993, Case No. B077109, 12/6/93

12. Slip Opinion, Case No. B077109, 12/28/93

13. Motion for Reconsideration, 1/7/94

14. Order denying motion for reconsideration, 1/10/94

15. Remittitur, case no. B077109, 3/16/94

16. Slip Opinion, Case No. B0077108, 6/10/94

17. Daily Appellate Report, 3/9/94, Case No. B070925, Case Name Robbins, et al. v. Foothill Nissan, et al.

18. Letter from Mr. Marvin G. Fischler of hosp & Associates re Memorandum of Costs on appeal, 4/4/94

19. Newspaper clipping, Titled State court system bias charged

20. Dismissal of Appeal, case no. B090974, case name ESTHER CHOW et al. v. First Interstate Bank, et al., 8/25/94

I declare under penalty of perjury of laws of California that the foregoing is true and correct, and that this declaration is executed on this 27th day of December, 1994 at Pomona, California.

/S/
Shong-Ching Tong